Duquesne Law Review

Volume 13 | Number 2 Article 5

1974

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I. INTRODUCTION

In June, 1972, the Supreme Court unexpectedly rendered a decision which apparently spared the lives of more than 600 death row inmates and invalidated nearly all of the capital punishment legislation then in effect.[1] Each member of the 5-4 majority wrote a separate opinion in support of a per curiam order holding that sentences of death entered pursuant to three statutes vesting capital sentencing discretion in a jury were contrary to the cruel and unusual punishment clause of the eighth amendment.[2] Although Justice Brennan and Justice Marshall held that capital punishment per se is in violation of the eighth amendment, the three other concurring Justices limited their holding to a conclusion that the imposition of a death sentence pursuant to the then prevailing system of capital punishment was unconstitutional. Two of these Justices, White and Stewart, explicitly reserved decision on the constitutionality of mandatory capital punishment;[3] all three condemned the jury-discretionary system because of the pattern of executions that it produced.[4]

Numerous states have enacted new capital punishment legislation designed to eliminate the constitutional defects identified by these three Justices. Broadly speaking, the new statutes may be

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1. Furman v. Georgia, 408 U.S. 238 (1972). The scope of the Court's opinion is recognized by the dissenting Justices; *see, e.g., id.* at 417 (Powell, J., dissenting):

> The Court's judgment removes the death sentences previously imposed on some 600 persons awaiting punishment in state and federal prisons throughout the country. . . . The capital punishment laws of no less than 39 States and the District of Columbia are nullified.

Id. (footnote omitted).

2. U.S. CONST. amend. VIII.

3. 408 U.S. at 310-11 (White, J., concurring); *id.* at 307-09 (Stewart, J., concurring).

4. For an elaboration of the rationale applied by each condemning the application of the jury-discretionary system of capital punishment see text at notes 24-31 *infra*.

divided into two categories: the "mandatory" statutes and the "guided discretionary" statutes. The "mandatory" statutes provide an automatic sentence of death upon conviction of specifically defined crimes such as first degree murder,[5] or a more narrowly drawn category of homicide;[6] the "guided discretionary" statutes provide the jury with a list of aggravating and mitigating circumstances and allow them to impose the death penalty for murder[7] (and in some cases rape),[8] if at least one aggravating circumstance and no mitigating circumstances are present.[9]

Under the doctrine accepted by *Furman* and earlier eighth amendment cases, the constitutionality of the new statutes will be determined by testing them against "evolving standards of decency."[10] The Court indicated in *Furman* that this testing would include an examination of material drawn from the social sciences.[11] The purpose of this article is to illuminate the role of empirical data in resolving the constitutional validity of the new statutes. In pursuit of this objective, part II of the article will examine the use of empirical data made by the Justices in *Furman*; using the approaches developed in *Furman* as a bench-mark, part III will discuss the probable role of the social sciences in determining whether the new statutes are valid under the rationale applied in *Furman*; and part IV will explore the role of the social sciences in resolving other issues relevant to testing the validity of the new statutes.

II. *Furman*'s Use of Empirical Data

In *Furman*, all nine Justices made some use of empirical data, but there were significant differences between not only the majority and the dissent, but also between the individual members of the majority regarding their views of both the Court's role in reviewing em-

5. *E.g.*, N.C. Gen. Stat. § 14-17 (Supp. 1974) (death penalty upon conviction for first degree murder).

6. *E.g.*, La. Rev. Stat. Ann. § 14:30(4) (1974) (murder with intent to kill more than one person).

7. *E.g.*, Cal. Penal Code §§ 189, 190.1-.3, 209 (West Supp. 1974).

8. *E.g.*, Ga. Code § 27-2534 (1973).

9. *E.g.*, Fla. Stat. § 921.141(5) (Supp. 1974).

10. Trop v. Dulles, 356 U.S. 86, 101 (1958) (Warren, C.J.) (plurality opinion). Every one of the nine justices in *Furman* expressly or impliedly accepted this test or a similar one as articulating the appropriate eighth amendment standard. *See, e.g.*, 408 U.S. at 383 (Burger, C.J., dissenting); *id.* at 242 (Douglas, J., concurring).

11. *See* text at notes 15-34 *infra*.

pirical data and the data's relevance to the constitutional issues. Despite these differences, all of the concurring Justices ultimately agreed that because of empirical data relating to the application of jury-discretionary capital punishment, death sentences imposed pursuant to that system of capital punishment are unconstitutional. Moreover, in finding capital punishment unconstitutional per se, Justice Brennan and Justice Marshall relied, in part, upon empirical evidence relating to the death penalty's efficacy as a deterrent; at least two other members of the majority indicated that if they were required to decide the ultimate constitutionality of capital punishment, this type of empirical evidence would be extremely relevant, if not dispositive. Thus, it would appear fruitful to explore the Court's use of empirical evidence in dealing with these two issues.

A. *The Death Penalty's Application*

The majority's condemnation of jury-discretionary capital punishment was premised upon conclusions that under this system the death penalty is applied arbitrarily,[12] infrequently,[13] and discriminatorily.[14] In reaching these conclusions, all members of the majority made use of empirical data. Justice Douglas relied upon empirical studies showing discriminatory application of the death penalty in various states over various periods of time[15] and statements by knowledgeable authorities[16] to conclude that under the jury-discretionary system the death penalty was imposed and carried out on "only those in the lower strata, only those who are members of an unpopular minority or the poor and despised."[17] He found this evidence sufficient to render the death penalty violative of the

12. 408 U.S. at 313 (White, J., concurring); *id.* at 309-10 (Stewart, J., concurring).

13. *Id.* at 313 (White, J., concurring); *id.* at 309-10 (Stewart, J., concurring).

14. *Id.* at 242 (Douglas, J., concurring).

15. *Id.* at 250-51. Douglas refers to the Koeninger study in Texas between 1924 and 1968 which indicated an unequal application of the death penalty in that blacks received the death penalty more often than whites in rape cases and in several co-defendant situations, and the Bedau study in Pennsylvania covering the period 1914 to 1958 which indicated that the death sentence was commuted in only 11.6% of the Negro cases, while the sentences of 20.2% of the whites awaiting death were commuted. *See* H. BEDAU, THE DEATH PENALTY IN AMERICA 474 (rev. ed. 1967); Koeninger, *Capital Punishment in Texas, 1924-1968*, 15 CRIME & DELIN. 132, 141 (1969).

16. *See* 408 U.S. at 251-52.

17. 408 U.S. at 248 n.10. Justice Marshall draws upon similar empirical evidence to reach a similar conclusion. However, this conclusion is not necessary to Justice Marshall's judgment. *Id.* at 364-66.

"cruel and unusual punishment" clause because:

> [T]he death penalty inflicted on one defendant is "unusual" if it discriminates against him by reason of his race, religion, wealth, social position, or class, or if it is imposed under a procedure that gives room for the play of such prejudices.[18]

Justices White, Stewart and Brennan relied upon empirical data to determine that the penalty is applied arbitrarily and infrequently, a conclusion which is critical to the judgment of White and Stewart. Through examination of sources which show the declining number of executions and the number of crimes committed annually for which death is the authorized penalty,[19] Justice Brennan concluded that the death penalty "is inflicted in a trivial number of the cases in which it is legally available."[20] Drawing upon this conclusion, Justice Brennan asserted that because of the infrequent executions, "it is highly implausible that only the worst criminals or the criminals who commit the worst crimes are selected for this punishment."[21] He goes on to say that no rational basis has been asserted for distinguishing "the few who die from the many who go to prison,"[22] and that, in fact, the procedures applied in capital cases are "not constructed to guard against the totally capricious selection of criminals for the punishment of death."[23] Based upon this analysis of the data, Justice Brennan concluded that there is a strong probability the death penalty is being inflicted arbitrarily,[24] and that taken in conjuction with his other conclusions, this probability is sufficient to render capital punishment violative of the eighth amendment.

Justice Stewart relied upon the sources cited by Justice Brennan and upon additional data cited by Chief Justice Burger to conclude that "the penalty of death is infrequently imposed for murder, and . . . its imposition for rape is extraordinarily rare."[25] He proceeded to the further conclusion that the condemned are a "capriciously selected random handful upon whom the sentence of death has in

18. *Id.* at 242 (Douglas, J., concurring).
19. *Id.* at 291-93 (Brennan, J., concurring).
20. *Id.* at 293.
21. *Id.* at 294.
22. *Id.*
23. *Id.* at 295.
24. *Id.*
25. *Id.* at 309 (Stewart, J., concurring) (footnote omitted).

fact been imposed."[26] Justice Stewart never fully articulated the basis for the latter conclusion. He did not say that the arbitrary infliction of the death penalty had been proven, but merely that no basis can be discerned for singling out the condemned except the "constitutionally impermissible basis of race."[27] Yet, he concluded that "racial discrimination has not been proved, and I put it to one side."[28] His opinion thus appears to imply that the absence of a discernible basis for distinguishing the few who are condemned from the many who are spared necessitates a conclusion that the death penalty is arbitrarily inflicted. Whether this step follows because of probabilities,[29] an allocation of the burden of proof to the state on this point, or his own evaluation of the evidence[30] is unclear. The conclusion that the death penalty is rarely and arbitrarily applied leads, however, to an unequivocal judgment:

> I simply conclude that the Eighth and Fourteenth Amendments cannot tolerate the infliction of a sentence of death under legal systems that permit this unique penalty to be so wantonly and so freakishly imposed.[31]

Justice White's judgment is also premised upon a conclusion that under the jury-discretionary system the death penalty is arbitrarily and infrequently applied. Although he referred to the data cited by the other Justices, Justice White found that he could not " 'prove' [his] conclusion from these data."[32] Emphasizing that he must "arrive at judgment,"[33] Justice White justified his conclusion on the basis of his own "almost daily exposure to the facts and circumstances of hundreds and hundreds of federal and state criminal cases involving crimes for which death is the authorized penalty."[34] He agreed with Justice Stewart in finding that the conclusion that the jury-discretionary system resulted in the infrequent and arbitrary imposition of capital punishment necessitated a finding that death sentences rendered pursuant to that system of capital punishment

26. *Id.* at 309-10 (footnote omitted).
27. *Id.* at 310 (footnote omitted).
28. *Id.* (footnote omitted).
29. *Compare* Justice Brennan's analysis in text at note 21 *supra*.
30. *Compare* Justice White's analysis in text at notes 32-34 *infra*.
31. 408 U.S. at 310 (Stewart, J., concurring).
32. *Id.* at 313 (White, J., concurring).
33. *Id.*
34. *Id.*

were in violation of the eighth amendment.[35]

The dissent differed from the majority in its view of both the weight which should be assigned to empirical proof and the role of the Court in reviewing empirical evidence. With respect to the death penalty's application, the dissent took the position that proof the death penalty has been applied discriminatorily or arbitrarily and infrequently would not establish a violation of the eighth amendment.[36] Nevertheless, the dissent reviewed the empirical evidence and found it to be constitutionally insufficient to establish a discriminatory or arbitrary pattern of executions.

Chief Justice Burger's dissent asserted that there was no empirical basis for concluding that the death penalty is imposed arbitrarily.

> [T]he sources cited contain no empirical findings to undermine the general premise that juries impose the death penalty in the most extreme cases. One study has discerned a statistically noticeable difference between the rate of imposition on blue collar and white collar defendants; the study otherwise concludes that juries do follow rational patterns in imposing the sentence of death.[37]

The Chief Justice's dissent also noted that the empirical evidence relating to the death penalty's discriminatory application was not sufficiently current:

> The statistics that have been referred to us cover periods when Negroes were systematically excluded from jury service and when racial segregation was the official policy in many States. Data of more recent vintage are essential.[38]

In support of the conclusion that proof of discrimination was insufficient both the Burger and Powell dissents cited with approval the Eighth Circuit case of *Maxwell v. Bishop*.[39] *Maxwell* decided that extensive empirical evidence showing that in southern rape

35. *Id.* at 314.

36. *Id.* at 447-50 (Powell, J., dissenting); *id.* at 397-99 (Burger, C.J., dissenting).

37. *Id.* at 389 n.12 (Burger, C.J., dissenting). The study referred to by the Chief Justice is Note, *A Study of the California Penalty Jury in First-Degree-Murder Cases*, 21 STAN. L. REV. 1297 (1969). He also cited and apparently relied upon H. KALVEN & H. ZIESEL, THE AMERICAN JURY 434-49 (1966).

38. 408 U.S. at 390 n.12.

39. 398 F.2d 138 (8th Cir. 1968).

cases the death penalty was discriminatorily applied against black men convicted of raping white women was insufficient to establish a violation of the equal protection clause. In addition to finding the evidence not sufficiently current, *Maxwell* noted that the study failed to take every variable into account[40] and did not relate specifically to the county where the defendant was tried and convicted.[41] Emphasizing that the defendant has the "burden of demonstrating discrimination,"[42] Justice [then Judge] Blackmun's opinion concluded that it was unlikely that "statistics will ever be [Maxwell's] redemption."[43] The dissent's apparent approval of *Maxwell* highlights the divergence between the dissent and majority with respect to the type of empirical proof each would require to establish a discriminatory or arbitrary application of the death penalty.

B. *The Death Penalty's Efficacy as a Deterrent*

After taking account of "logical hypotheses" advanced in favor of the position that the death penalty is superior to other punishments as a deterrent,[44] Justice Marshall reviewed a number of studies relating to the death penalty's efficacy as a deterrent,[45] and found that the conclusions drawn from these studies supported a United Nations committee's statement that " 'the data which now exist show no correlation between the existence of capital punishment and lower rates of capital crime.' "[46] In evaluating the impact of this evidence, Justice Marshall concluded that although

> [the] abolitionists have not proved non-deterrence beyond a reasonable doubt, they have succeeded in showing by clear and convincing evidence that capital punishment is not necessary as a deterrent to crime in our society. This is all that they must do. We would shirk our judicial responsibilities if we failed to

40. *Id.* at 147.
41. *Id.* at 146.
42. *Id.* at 147.
43. *Id.* at 148.
44. 408 U.S. at 347-48 (Marshall, J., concurring).
45. *Id.* at 348-52. Justice Marshall gives especial weight to the study conducted for the A.L.I. MODEL PENAL CODE by Professor Sellin. *See* T. SELLIN, THE DEATH PENALTY, A REPORT FOR THE MODEL PENAL CODE 5 (1959) [hereinafter cited as SELLIN STUDY]. Sellin found no correlation between the homicide rate and either the presence or absence of the murder sanction or executions. Further, abolition and/or reduction of capital punishment does not affect homicide rates.
46. 408 U.S. at 353.

> accept the presently existing statistics and demanded more proof.[47]

The determination that the death penalty is no more effective than other punishments as a deterrent was one of several findings which led Marshall to conclude that the death penalty is excessive and, therefore, in violation of one of the two relevant prongs of the cruel and unusual punishment clause.[48]

Drawing upon the same empirical data cited by Justice Marshall, Justice Brennan found that the data "uniformly indicates, although it does not conclusively prove, that the threat of death has no greater deterrent effect than the threat of imprisonment."[49] Claims to the contrary, purportedly based on common human experience, were not persuasive to Justice Brennan because of the fact that under our present system the death penalty is not invariably or swiftly applied:

> Whatever might be the case were all or substantially all eligible criminals quickly put to death, unverifiable possibilities are an insufficient basis upon which to conclude that the threat of death today has any greater deterrent efficacy than the threat of imprisonment.[50]

This determination was necessary to Justice Brennan's conclusion that the death penalty was a severe penalty which was excessive and thus in violation of one of the four prongs of the cruel and unusual punishment clause.[51]

Justice White's conclusion that the jury-discretionary death penalty no longer presents a credible deterrent is central to his judgment. In reaching this conclusion, White did not rely upon empirical evidence as such but stated that "common sense and experience" teach us that seldom-enforced laws cannot serve as an effective deterrent.[52] His determination that the jury-discretionary death

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47. *Id.*

48. Marshall also concluded that the death penalty is in violation of the eighth amendment because it is "morally unacceptable to the people of the United States at this time in their history." 408 U.S. at 360.

49. *Id.* at 301 (Brennan, J., concurring).

50. *Id.* at 302 (footnote omitted).

51. *Id.* at 305. Justice Brennan also concluded that the death penalty is cruel and unusual because it is "so severe as to be degrading to the dignity of human beings," *id.* at 271; a severe penalty which is arbitrarily inflicted by the state, *id.* at 274; and a punishment which is unacceptable to contemporary society, *id.* at 277.

52. *Id.* at 312 (White, J., concurring).

penalty is infrequently and arbitrarily enforced led directly to the conclusion that such punishment violates the eighth amendment because it ceases to be a credible deterrent or measurably to contribute to any other end of punishment in the criminal system.[53]

Both White and Stewart specifically noted that they were not passing upon the constitutionality of a statute which imposed a mandatory death sentence upon conviction of a capital crime.[54] Although Justice White said nothing about the relationship between empirical evidence relating to deterrence and the resolution of this issue,[55] Justice Stewart was less circumspect. Resolving the constitutional validity of these statutes would, under his view, require the Court to

> decide whether a legislature . . . could constitutionally determine that certain criminal conduct is so atrocious that society's interest in deterrence and retribution wholly outweighs any considerations of reform or rehabilitation of the perpetrator, and that, despite the inconclusive empirical evidence, only the automatic penalty of death will provide maximum deterrence.[56]

Obviously, this passage raises as many questions as it answers. How can a court or legislature measure a punishment's retributive effect? Assuming the death penalty does satisfy a legitimate need for retribution, what effect, if any, will this have on the degree to which the legislature will be required to justify the punishment as a deterrent?

Interpreted literally, Justice Stewart's language implies that the death penalty will only be upheld if it provides "maximum deterrence." What is the meaning of this phrase? Most significantly, what standard should the Court apply in reviewing a legislature's judgment relating to deterrence and/or retribution? Since Justice White and Justice Stewart appear to be the "pivotal" swing votes,[57] the answers to these questions may prove critical in determining the ultimate constitutionality of capital punishment.

The dissent's view of deterrence is radically different. After initially suggesting that a conclusive demonstration that the death

53. *Id.* at 311-12.

54. *Id.* at 307 (Stewart, J., concurring); *id.* at 311 (White, J., concurring).

55. Justice White did note that it was unnecessary for him to decide whether the death penalty as such is "a more effective deterrent than a lesser punishment." *Id.* at 312.

56. *Id.* at 307-08 (footnote omitted).

57. *See id.* at 400 (Burger, C.J., dissenting).

penalty lacked efficacy as a deterrent would not be constitutionally relevant,[58] the dissent nevertheless examined the empirical evidence relating to deterrence. Starting with the premise that a legislative judgment on this issue would be subject to attack only if it were demonstrated that there was no rational basis for concluding that the death penalty was a more effective deterrent than other types of punishment,[59] the dissent concluded that in view of the inconclusive results from the empirical data,[60] the legislature's judgment regarding deterrence must be allowed to stand.

The dissent's view of the Court's role makes it virtually impossible for abolitionists to establish the death penalty's inefficacy as a deterrent on the basis of empirical evidence.

III. Testing the Validity of the New Statutes Under *Furman*

The *Furman* majority's focus upon the results produced by jury-discretionary capital punishment indicates that *Furman* is premised upon the view that this system produces a constitutionally intolerable pattern of death sentences.[61] Although the Court limited its holding to invalidating capital sentences imposed pursuant to the jury-discretionary system, the rationale of the concurring Justices is broad enough to invalidate any system of capital punishment which allows a discretionary judgment to produce a rare, arbitrary, freakish and discriminatory application of the death penalty.[62]

Administration of the new statutes—both "mandatory" and "guided discretionary"—will obviously involve significant discretionary judgments because the statutes function in a system which is honeycombed with discretion. The prosecutor's virtually unlimited discretion—both in initiating charges and in accepting guilty pleas to lesser-included charges—has always been widely exercised in capital cases.[63] When a capital case comes to trial, the jury

58. *Id.* at 451 (Powell, J., dissenting); *id.* at 375 (Burger, C.J., dissenting).

59. *Id.* at 454-55 (Powell, J., dissenting). *See also* Chief Justice Burger's comment that "the questions raised by the necessity approach are beyond the pale of judicial inquiry under the Eighth Amendment." *Id.* at 396.

60. *Id.* at 396 (Burger, C.J., dissenting).

61. *See* text at notes 12-34 *supra*.

62. *See, e.g.*, Justice Stewart's language quoted in text at note 31 *supra*.

63. *See, e.g.*, Alschuler, *The Prosecutor's Role in Plea Bargaining*, 36 U. Chi. L. Rev. 50, 53 (1968); Carney & Fuller, *A Study of Plea Bargaining in Murder Cases in Massachusetts*, 3 Suffolk U.L. Rev. 292 (1969); White, Book Review, 74 Col. L. Rev. 319, 324 (1974).

has significant discretion, even under a mandatory system, because of its obligation to consider the relatively amorphous elements and defenses relevant to all capital charges,[64] and its inherent power to nullify capital punishment by acquitting the defendant[65] or convicting him of a lesser-included non-capital offense which is not supported by the evidence.[66] Moreover, if a capital sentence is imposed, trial and appellate courts may still utilize various discretionary techniques to avoid its execution;[67] and, when all judicial remedies are exhausted, the executive's virtually unlimited power to grant clemency may be exercised to spare the defendant's life.[68] Unless a new statute eliminated these discretionary devices, the shift from a "jury-discretionary" system to a "mandatory" or a "guided discretionary" system would appear to be a change in form only—a change that will not substantially alter the way in which the death penalty will be applied.[69] Abolitionists will undoubtedly argue that

64. *See, e.g.*, Justice Cardozo's comments on the legal definition of premeditation:

> What we have is merely a privilege offered to the jury to find the lesser degree when the suddenness of the intent, the vehemence of the passion, seems to call irresistibly for the exercise of mercy. I have no objection to giving them this dispensing power, but it should be given to them directly and not in a mystifying cloud of words.

B. CARDOZO, LAW AND LITERATURE 99-101 (1931). *See generally* Black, *The Crisis in Capital Punishment*, 31 MD. L. REV. 289, 295-300 (1971).

65. *See generally* Mackey, *The Inutility of Mandatory Capital Punishment*, 54 B.U.L. REV. 32 (1974).

66. In most jurisdictions, conviction of a lesser-included non-capital offense will be sustained even though the evidence presented to the jury shows the defendant was either guilty of the capital offense or nothing. *See, e.g.*, Taylor v. Commonwealth, 186 Va. 587, 591, 43 S.E.2d 906, 908 (1947). Under the majority view, the judge in effect has discretion to decide whether an unsupported lesser-included charge shall be submitted to the jury. Recently, the Third Circuit decided that where the judge is explicitly vested with this discretion, he is constitutionally obligated to instruct the jury as to the lesser-included offense, thereby insuring they will have an opportunity to exercise their nullification power. *See* Matthews v. Johnson, 502 F.2d 339 (3d Cir. 1974).

67. *See, e.g.*, Stein v. New York, 346 U.S. 156 (1953) (dictum):

> When the penalty is death, we, like state court judges, are tempted to strain the evidence and even, in close cases, the law in order to give a doubtfully condemned man another chance.

Id. at 196. For an analysis of one state supreme court's utilization of special standards of review in capital cases, see McDonald, *Capital Punishment in South Carolina: The End of an Era*, 24 S. CAR. L. REV. 762 (1972).

68. *See generally* Note, *Executive Clemency in Capital Cases*, 39 N.Y.U.L. REV. 136 (1964).

69. The change to a mandatory system will have the effect of shifting some of the discretion exercised by the jury to others, particularly the prosecutor and the executive. By obscuring the visibility of the discretionary judgments, this change can only increase the potential for arbitrary and discriminatory application of the death penalty.

in light of their predictable practical operation, the new statutes will exhibit all of the vices *Furman* found to be antithetical to the values of the eighth amendment.

What role may the social sciences have in substantiating or rebutting this claim? Pending actual executions, empirical evidence relating to the new statutes' operation will be incomplete.[70] The data relating to death sentences imposed, however, permit at least some empirical testing of the extent to which a pattern of discriminatory, arbitrary, or infrequent pattern of death sentences has resulted.

Under Justice Douglas' view of the eighth amendment, discriminatory application of the death penalty is sufficiently established if death penalties are disproportionately imposed upon minority groups or the poor,[71] or "if it is imposed under a procedure that gives room for the play of such prejudices."[72] In view of this test, data exposing the extent to which a new system of capital punishment has in fact been disproportionately imposed upon discrete groups of the population would obviously be relevant to prove discrimination in fact.[73] In testing whether a procedure is one which allows room for the play of prejudice, it would appear appropriate to examine the extent to which any of the discretionary techniques available under a new system were exercised in a discriminatory manner in the past. If it can be shown that prosecutorial plea-bargaining discretion, executive clemency, or any of the other discretionary devices unaltered by the new system were previously exercised so as to discriminate against capital defendants of a certain race or economic class,[74] this should be sufficient to establish, at least under the Douglas rationale, that the new system of capital punishment is unconstitutional.

In view of the position of Justice White and Justice Stewart, empirical data evidencing the extent to which the new systems of

70. Until a capital defendant is actually executed, it cannot be determined that the power of executive clemency will not be exercised to spare the defendant's life.

71. *See* text at note 17 *supra*.

72. 408 U.S. at 242 (Douglas, J., concurring).

73. *Furman* indicates that in determining whether the application of a system of capital punishment is in violation of the eighth amendment, the Court will examine results produced by that system in the nation as a whole rather than in one particular state. *See* text at notes 12-34 *supra*. In view of the Court's role under the eighth amendment (*i.e.*, gauging punishments on the basis of a broad spectrum of community sentiment), this approach seems appropriate.

74. *See, e.g.*, Wolfgang, Kelly, & Nolde, *Comparison of the Executed and the Commuted Among Admissions to Death Row*, 53 J. CRIM. L.C. & P.S. 301 (1962).

capital punishment produce arbitrary and infrequent results are crucial. Testing the new systems' "frequency" will not always be easy. Where a "guided-discretionary" system is in effect, comparing the number of capital sentences imposed with the number of convictions for capital crimes yields an estimate of the frequency with which the death penalty is imposed.[75] Discounting this estimate by the percentage of death sentences previously commuted through executive clemency[76] results in a somewhat more speculative estimate of the execution rate which can be expected in the event the "guided-discretionary" statutes are held constitutional. With the "mandatory" statutes, measuring infrequency is more difficult. If the statute is truly "mandatory" (in the sense that the death sentence is automatically imposed upon conviction of a capital crime), the number of defendants convicted of capital crimes will necessarily equal the number sentenced to death. This ratio is misleading, however, in that it fails to account for not only the potential capital cases eliminated as a result of prosecutorial discretion,[77] but also the number of cases in which the jury exercised its nullification power so as to avoid the automatic imposition of a death sentence which would follow upon conviction of a capital crime.[78] Since flexibility at the sentencing stage has been stifled, the executive will be inclined to "review more carefully sentences which were imposed without any opportunity for the sentencer to be lenient."[79] As a result, the rate at which executive clemency was granted under a jury-discretionary system is likely to underestimate the number of commutations to be expected under a "mandatory" system.

Despite these difficulties, it seems probable the empirical data will show that, for the most part, the new systems of capital punishment do not alter the fact that the death penalty is infrequently applied.[80] Determining whether the new systems result in the arbi-

75. Of course, this "estimate" does not take account of the cases in which the exercise of prosecutorial discretion eliminated the possibility of a capital conviction despite the fact the state's evidence may have been sufficient to sustain such a conviction.

76. One would look to the percentage of death sentences commuted under the jury-discretionary system which was previously in effect.

77. *See* text at note 63 *supra*.

78. *See* text at note 65 *supra*.

79. Note, *Discretion and the Constitutionality of the New Death Penalty Statutes*, 87 HARV. L. REV. 1690, 1716 (1974); *see* Note, *Executive Clemency in Capital Cases*, 39 N.Y.U.L. REV. 136, 181 (1964).

80. As of August 28, 1974, there were 140 prisoners on death row in the United States. Since these prisoners have accumulated over the two year post-*Furman* period, it appears

trary infliction of capital punishment, however, will be even more difficult. Because of the virtually infinite number of variables which may be legitimately considered in determining whether a capital sentence should be imposed, empirical data in the form of comparisons between capital defendants spared and those executed could probably never unequivocally demonstrate that the death penalty was being arbitrarily applied.[81] With respect to this issue, the standard of scrutiny utilized by the Court in evaluating empirical evidence is crucial.

What standard of scrutiny should the Court apply? First, was it proper for the *Furman* majority to reject the traditional approach applied by the dissent? If abolitionists want to establish that the death penalty is arbitrarily applied, should not they be required to "undermine the general premise" that juries and agencies of the state are acting rationally rather than discriminatorily or arbitrarily? Should not legislation challenged under the cruel and unusual punishment clause be entitled to the same presumption of constitutionality accorded to a statute challenged under the due process clause[82] or the equal protection clause?[83]

In answering these questions, one must begin with a proper understanding of the function of the cruel and unusual punishment clause. The eighth amendment requires the Court to decide whether a penalty enacted by the legislature is "cruel and unusual," *i.e.*, one that does not comply with our "evolving standards of decency."[84]

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capital punishment is being imposed less frequently than in the sixties, when as Justice Brennan noted, death penalties were imposed on an average of about 100 per year. 408 U.S. at 291-92.

In some jurisdictions, however, the frequency with which the death penalty is being imposed has increased. For example, the North Carolina system which imposes capital punishment upon conviction of first degree murder or rape has resulted in the imposition of the death penalty upon 47 North Carolina defendants, a rate of imposition which is drastically higher than that produced by the jury-discretionary system. Since a new system's constitutionality must be determined on the basis of results produced in the nation as a whole, *see* note 73 *supra*, a striking change in a single jurisdiction should not have any significant effect upon the constitutional determination.

81. *See, e.g.*, Winston v. United States, 172 U.S. 303, 313 (1899).

82. *See* Ferguson v. Skrupa, 372 U.S. 726, 729 (1963).

83. *See* Maxwell v. Bishop, 398 F.2d 138, 148 (8th Cir. 1968).

84. Trop v. Dulles, 356 U.S. 86, 101 (Warren, C.J.) (plurality opinion). The amendment could have been interpreted to forbid only punishments not authorized by the legislature. This interpretation, however, would appear contrary to the basic scheme of the Bill of Rights because, unlike the other amendments contained in the Bill of Rights, the eighth amendment would provide no check upon legislative excess. In any event, the Court has clearly held that it must judge legislation enacting penalties against our "evolving standards of decency." *See* note 10 *supra*.

This places the Court in an unusual role. Because of its representative character, the legislature generally has sole responsibility for determining whether a law is decent or acceptable in terms of community values; the Court's role is limited to determining whether the law is rationally related to a constitutionally permissive objective,[85] or whether it infringes upon other interests protected by the Constitution.[86] The constitutional ban upon cruel and unusual punishments, however, reflects the view that when harsh punishments are involved, the possibility that the legislature was influenced by momentary impulses or overriding emotions makes it appropriate for the Court to test the punishments' acceptability. When a punishment is challenged under the eighth amendment, the Court must make the same type of judgment required of the legislature. In weighing empirical evidence relevant to this judgment, it is not appropriate for the Court to give its traditional deference to legislative findings. Precisely because the eighth amendment is to provide protection against punishments which are a product of overriding emotions, the Court should independently scrutinize empirical evidence relating to the operation of a severe penalty so as to insure that the penalty in fact reflects contemporary attitudes of decency and is not merely a reflection of what the public will allow to be placed on the statute books to be enforced in a non-regular fashion. Where the uniquely severe penalty of death is involved, the Court should insist that the state demonstrate at least some degree of rationality in the penalty's application. If the available empirical evidence relating to a new system of capital punishment does not establish some constitutionally permissible criteria for distinguishing the few who are sentenced to death from the many who are spared, this should be sufficient to establish an arbitrary infliction of the death penalty within the meaning of the White-Stewart opinions in *Furman*.[87]

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85. *See, e.g.*, Williamson v. Lee Optical, Inc., 348 U.S. 483, 491 (1955).

86. *See, e.g.*, Brandenburg v. Ohio, 395 U.S. 444 (1969) (invalidating statute which infringes upon constitutional guarantees of free speech and free press).

87. This analysis is consistent with the rationale articulated by Justice Stewart, because Stewart's opinion appeared to conclude that where no legitimate basis is established for distinguishing between capital offenders spared and those sentenced to death, the Court must conclude the death penalty is arbitrarily inflicted. *See* text at notes 25-31 *supra*.

The analysis seems particularly appropriate in view of the fact the new systems of capital punishment appear to be only formally different from the system invalidated in *Furman*. In view of the way the total administration of justice operates, commentators and judges have noted that limiting only sentencing discretion may "not make much of a practical difference."

IV. Beyond *Furman*

If a new system of capital punishment withstands scrutiny under the rationale applied by the majority in *Furman*, the Court will be forced to decide, among other things, whether the new system provides adequate procedural safeguards for defendants; whether the new system operates so as to impose excessive penalties; and finally, whether the death penalty per se is unconstitutional. Empirical data from the social sciences could have a significant impact in resolving each of these issues.

A. *Procedural Safeguards*

Litigation concerning procedural safeguards in capital cases will probably continue to center upon various aspects of the jury trial, especially the jury's function in determining guilt and penalty[88] and the jury selection process.[89] In scrutinizing a new capital punishment system's method of jury selection, the role of the social sciences could be particularly important. In *Witherspoon v. Illinois*,[90] the Court held that the practice of excluding for cause all veniremen opposed to capital punishment or those who expressed conscientious scruples against its infliction was unconstitutional because the remaining pool of potential jurors would be biased in favor of imposing capital punishment.[91] The Court limited the effect of its decision by stating that the decision had no bearing on a state's power to exclude veniremen who make it

> unmistakably clear (1) that they would *automatically* vote against the imposition of capital punishment . . . , or (2) that their attitude toward the death penalty would prevent them from making an impartial decision as to the defendant's *guilt*.[92]

In reaching this result, the Court relied in part upon empirical

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Wollan, *The Death Penalty After Furman*, 4 Loyola L.J. 339, 351 (1973). *See* Note, *Discretion and the Constitutionality of the New Death Penalty Statutes*, 87 Harv. L. Rev. 1690, 1716 n.176 (1974). It should, therefore, be especially incumbent upon the states to demonstrate that a new system of capital punishment does not in fact operate so as to produce the same vices condemned by the concurring Justices in *Furman*.

88. *See, e.g.*, McGautha v. California, 402 U.S. 183 (1971) (upholding the constitutionality of a unitary trial procedure under which the same jury decides guilt and penalty in a single proceeding).

89. *See, e.g.*, Witherspoon v. Illinois, 391 U.S. 510 (1968).

90. *Id.*

91. *Id.* at 522-23.

92. *Id.* at 522-23 n.21.

evidence which revealed that a substantial proportion of the population was opposed to the death penalty.[93] In dictum, the Court also indicated that if future empirical evidence could substantiate the claim that the exclusion of veniremen opposed to capital punishment resulted in a jury which is "prosecution prone" with respect to the determination of guilt, this might result in a holding that all *convictions* rendered by those juries are constitutionally invalid.[94]

On the basis of *Witherspoon*, evaluation of empirical evidence relating to the population's views on capital punishment and to a death-qualified jury's proneness to convict will have an important part in determining the constitutionality of a new capital punishment system's jury selection process. If a "mandatory" selection system provides for the exclusion of veniremen whose views on capital punishment render them unable to make an "impartial decision," post-*Witherspoon* empirical data comparing attitudes and simulated trial performances of death-qualified juries and normal juries should be examined for the purpose of determining whether the resulting jury is "prosecution prone."[95] Empirical data measuring the exclusionary test's effect on the jury population as a whole, and the extent to which it disproportionately eliminates members of discrete segments of the population, such as blacks or women, should be scrutinized for the purpose of determining whether the selection process results in a violation of the defendant's right to a jury which represents a cross-section of the community.[96] On the other hand, if the "mandatory" system does not provide for any form of death-qualification, empirical data relating to the population's views on capital punishment would be important for the purpose of determining the likelihood that a given jury would in fact exercise discretion. If it appeared that, because of their views on capital punishment, a sizeable proportion of the population would, in at least some cases, refuse to vote for a verdict carrying with it an automatic sentence of death, then abolitionists could convincingly argue that the "mandatory" system is invalid under *Furman*. Given the views of a sizeable proportion of the population from which the jury is being chosen, the defendant is being sen-

93. *Id.* at 520 n.16.

94. *Id.* at 517-23.

95. *See, e.g.*, Jurow, *New Data on the Effect of a "Death Qualified" Jury on the Guilt Determination Process*, 84 HARV. L. REV. 567 (1971). *See generally* White, *The Constitutional Invalidity of Convictions Imposed by Death-Qualified Juries*, 58 CORNELL L. REV. 1176 (1973).

96. *See* Duncan v. Louisiana, 391 U.S. 145, 156 (1968).

tenced pursuant to a "jury-discretionary" system in the sense that at least a substantial proportion of the jury is in fact exercising discretion as to whether or not a capital sentence will be imposed.

Where a "guided-discretionary" system is in effect, similar issues will need to be resolved. If a bifurcated trial system is employed,[97] the state may avoid some potential *Witherspoon* problems by "using one jury to decide guilt and another to fix punishment."[98] In this situation, however, the question arises as to whether it is procedurally fair to allow the defendant to be sentenced to death by a jury which at best has an imperfect grasp of the evidence relating to guilt.[99] Empirical data obtained pursuant to simulated tests[100] or questioning of jurors who actually participated in capital cases might shed further light on this issue.

If, on the other hand, a unitary trial procedure is adopted, issues relating to "prosecution proneness," the defendant's right to a representative jury, and *Furman's* ban upon a jury-discretionary system of capital punishment are presented in a slightly different context.[101] Evaluation of the relevant empirical data would again be essential to a proper resolution of these issues.[102]

B. *Excessiveness*

With respect to some statutes imposing mandatory capital punishment upon conviction, abolitionists may cogently argue that the statute is constitutionally overbroad or "excessive" in the sense that it requires the imposition of capital punishment upon conviction for some crimes as to which the imposition of the death penalty would

97. Under such a system the questions of guilt and punishment are determined at separate and discrete stages of the proceedings.

98. 391 U.S. at 520 & n.18.

99. Most importantly, the penalty jury would not be aware of the extent to which the first jury might have felt *some* residue of doubt as to the defendant's guilt despite the fact that they found him to be guilty beyond a reasonable doubt.

100. A comparison could be made between the capital sentencing performance of jurors who actually determine the guilt of a capital defendant and jurors who are merely told the defendant is (or has been adjudicated) guilty of the capital crime.

101. For example, if the jury is "death-qualified," the "prosecution proneness" issue will be somewhat different from that arising under a "mandatory" system because in this context, the state does have the alternative for providing a split verdict procedure.

102. Empirical evidence dealing with the difficulties a penalty jury may have in determining sentence when it has not adjudicated the defendant's guilt may be more difficult to obtain. Results from simulated trials, *see* note 100 *supra*, or interviews of jurors who have participated in various types of capital trials could, however, supply some useful information.

be a punishment disproportionate to the offense.[103] The doctrine of excessiveness was developed by the Supreme Court in *Weems v. United States*.[104] In determining whether a section of the Philippine Code of Criminal Procedure was in violation of the eighth amendment, the Court measured the statute's minimum penalty (12 years imprisonment with hard and painful labor and accessory penalties)[105] against the minimum offense (making a single false entry in a public and official document) and illustrated the severity of the law in question by comparing it with penalties required by other criminal statutes both within the Philippines and in other jurisdictions. Concluding that "[s]uch penalties for such offenses amaze those . . . citizens [who] . . . believe . . . that punishment for crime should be graduated and proportioned to the offense,"[106] the Court held the law under which the defendant's sentence was imposed unconstitutional.

As *Weems*' reference to penalties which "amaze" ordinary citizens suggests, whether a sentencing statute is excessive must ultimately be determined on the basis of community sentiment.[107] In gauging community sentiment, empirical data providing an accurate index of the extent to which the population favors or opposes the rigid application of capital punishment for particular crimes would be indispensable.[108] While dissenting in *Furman*, Justice Blackmun

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103. Since our modern philosophy of sentencing focuses upon the individual characteristics of the offender as much as the circumstances of the crime, *see, e.g.*, Williams v. New York, 337 U.S. 241 (1949), it seems evident the death penalty would be disproportionate to the offense when automatically applied to some offenders who fall within the terms of the new mandatory statutes.

> Specific rape cases (and specific homicides as well) can be imagined in which the conduct of the accused would render the ultimate penalty a grossly excessive punishment.

Furman v. Georgia, 408 U.S. 238, 461 (1972) (Powell, J., dissenting).

104. 217 U.S. 349 (1910).

105. The accessory penalties included civil disabilities and the requirement that the prisoner wear a chain hanging from the ankles and wrists during the entire term of imprisonment. *Id.* at 364.

106. *Id.* at 366-67.

107. *Id. See also* Workman v. Commonwealth, 429 S.W.2d 374, 377 (Ky. 1968).

108. Constitutional issues will not, of course, be decided solely on the basis of the results of public opinion sampling. A mere indication of the percentage of people who "favor" or "oppose" a particular form of mandatory capital punishment would not provide substantial guidance for a court. A more sophisticated form of sampling which focused upon an individual's willingness to see the death penalty imposed in discrete factual situations falling within a mandatory statute would, however, provide somewhat firmer empirical evidence; and under *Weems* and Trop v. Dulles, 356 U.S. 86 (1958), comparison of the challenged penalty with

observed that legislation imposing mandatory capital punishment upon conviction

> is regressive and of an antique mold, for it eliminates the element of mercy in the imposition of punishment. I thought we had passed beyond that point in our criminology long ago.[109]

If it appears that these views accurately reflect contemporary community sentiment, there is a compelling basis for invalidating some, if not all, statutes imposing "mandatory" capital punishment on the grounds that they are constitutionally excessive.

C. *The Constitutionality of the Death Penalty Per Se*

Ultimately, the Court will have to determine whether the penalty of death is an acceptable punishment in our society. In deciding this question, the Court should, of course, examine the empirical evidence which points to societal acceptance or rejection of this penalty.[110] If this evidence indicates the death penalty has become "an indecency" which should not be tolerated in our society,[111] this will obviously end the Court's inquiry. But, if the evidence of societal rejection is less clear, the Court should evaluate empirical evidence for the purpose of weighing the benefits to be achieved by capital punishment against the cruelty which this punishment inflicts upon the individual.

Crucial to determining the benefits to be achieved by the death penalty is an analysis of the empirical evidence relating to that punishment's efficacy as a deterrent. What type of judicial stance should the Court adopt in reviewing this evidence? Is it correct to argue, as the dissent does, that so long as the evidence is inconclusive, the implied legislative judgment that the penalty acts as a deterrent must be accepted?[112] Or should the Court base its decision on the preponderance of the evidence?[113]

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the punishments prescribed in the same jurisdiction for equally or more serious offenses and comparison of the challenged penalty with the punishments prescribed for the same offense in other jurisdictions, or in other countries would also be relevant.

109. 408 U.S. at 413.

110. In making this determination, the Court should look to, among other things, the extent to which the death penalty is even-handedly applied in society, the extent to which there is a nation-wide or world-wide trend towards abolition, and the circumstances under which the death penalty is actually executed.

111. Black, *The Crisis in Capital Punishment*, 31 MD. L. REV. 289, 290 (1971).

112. *See* text at notes 59-60 *supra*.

113. *See* text at notes 47-49 *supra*.

In resolving this issue, the Court's role must again be considered. In determining whether a punishment is barred by the eighth amendment, the Court is not reviewing legislation for the purpose of deciding whether it is rationally related to a legitimate legislative objective. Instead, it must essentially make an independent judgment as to whether or not the punishment is, in fact, acceptable.[114]

In making this type of judgment, the Court cannot give excessive deference to the legislature's evaluation of the empirical studies. If the conclusions to be drawn from the studies are inconclusive, in the sense that some properly conducted studies indicate the death penalty is a more efficacious deterrent than other penalties while others indicate it is not, judicial deference to a legislative judgment that the studies establishing the death penalty's efficacy as a deterrent are more accurate would perhaps be appropriate.

As in the case of judicial review relating to the death penalty's application,[115] however, the Court should demand rational justification based upon proof before any implied claim relating to deterrence is accepted. Given the significant amount of existing data relating to deterrence,[116] the Court should not permit the legislature to rely on assumptions which do not have an empirical basis. If the results from the studies are inconclusive, in the sense that, although consistent with the hypothesis that the death penalty is not a more efficacious deterrent than other penalties, they do not unequivocally demonstrate this proposition,[117] deference to the legislature should at most allow them to conclude that there is *some* possibility that in certain situations the death penalty is marginally more effective than other punishments.

Defining the magnitude of the death penalty's efficacy as a deterrent is important because the Court is engaged in a balancing process in which capital punishment's efficacy as a deterrent is but one element to be considered. Even if the legislature can legitimately conclude that, as it will be applied under a new system of capital punishment,[118] the death penalty will be a marginally more effective

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114. *See* text at notes 84-87 *supra*.

115. *See* text at notes 86-87 *supra*.

116. *See generally* Bedau, *Deterrence and the Death Penalty: A Reconsideration*, 61 J. CRIM. L.C. & P.S. 539 (1970).

117. *See, e.g.*, SELLIN STUDY discussed in note 45 *supra*.

118. Justice Brennan properly notes that the question of deterrence should not focus on the abstract question of whether the death penalty in general is an optimal deterrent, but rather upon whether the system of capital punishment which is being applied is in fact a more efficacious deterrent than other forms of punishment. *See* text at note 49 *supra*.

deterrent than other punishments, the Court must still decide whether this benefit is sufficient to outweigh the mental and physical anguish which is inflicted upon those who are condemned to death and those who are in fact executed.

The second part of this balancing process will be difficult for two reasons. First, providing an accurate estimate of the extent to which an executed individual suffers is obviously impossible. There is no scientific method available for determining whether there is any mode of execution which renders death instantaneous.[119] As Professor Black has said, "Here we knock on the door that never opens."[120]

Empirical evidence can play a role, however, in documenting the extent to which an impending execution inflicts mental anguish upon a condemned man. Up-to-date studies which show the extent to which the new systems of capital punishment are in fact forced to postpone execution in order to ensure compliance with due process of law will provide some index of the length of individual suffering; and psychological studies of condemned or formerly condemned men may provide empirical support for the California Supreme Court's conclusion that "the process of carrying out a verdict of death is often so degrading and brutalizing to the human spirit as to constitute psychological torture."[121]

The second difficulty with the balancing process is determining where the balance should be struck. To what extent will an increment in deterrence of serious crimes justify a process which inflicts severe mental anguish upon individuals? Even if it could be shown that a system of capital punishment as applied in fact will deter criminals somewhat more effectively than other punishments, is this societal benefit sufficient to justify the system's infliction of suffering upon those who are condemned and executed? If the eighth amendment indeed provides a check upon legislative excess,[122] the Court must resolve this kind of issue not by deferring to the legislature,[123] but by drawing upon accepted standards of morality for the purpose of determining whether the benefits to be achieved by the death penalty are worth the cost of the untold mental anguish inflicted by that punishment.

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119. *See* H. BARNES & N. TEETERS, NEW HORIZONS IN CRIMINOLOGY 306-09 (3d ed. 1959); Comment, *The Death Penalty Cases*, 56 CALIF. L. REV. 1268, 1338 (1968).

120. Black, *The Crisis in Capital Punishment*, 31 MD. L. REV. 289, 292 (1971).

121. People v. Anderson, 6 Cal. 3d 628, 649, 493 P.2d 880, 894, 100 Cal. Rptr. 152, 166 (1972) (footnote omitted).

122. *See* text at notes 84-85 *supra*.

123. *But see* Furman v. Georgia, 408 U.S. 238, 465 (1972) (Rehnquist, J., dissenting).

V. Conclusion

Justice Holmes once noted:

> If your subject is law, the roads are plain to anthropology, the science of man, to political economy, the theory of legislation, ethics, and thus by several paths to your final view of life.[124]

In determining the constitutionality of capital punishment, the interdependence between the law and other disciplines is obvious. While *Furman* invalidated the jury-discretionary system of capital punishment on the ground that the system resulted in an unconstitutional application of the death penalty, the Court did not decide the constitutional validity of other systems of capital punishment, leaving open not only the question of whether a new system could be constitutionally applied, but also issues relating to procedural fairness in administering the death penalty, whether the death penalty is a constitutionally excessive punishment for certain crimes, and whether the death penalty as such is unconstitutional.

An analysis of these issues shows none of them can be intelligently resolved without the evaluation of empirical data drawn from the social sciences. Although a great deal of relevant empirical data already exists, accumulation of additional data which will not only update prior studies but permit the exploration of new issues, is highly desirable, if not indispensable.

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124. The Mind and Faith of Justice Holmes 32 (Lerner ed. 1943).